MALAYSIAN REPORTS

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO O2-202-2-89
MOHAMED AZMI, AJAIB SINGH AND GUNN CHIT TUAN SCJJ
22 AUGUST 1990

Administrative Law —Certiorari —Application for leave to apply for certiorari to quash decision of Industrial Court —Principles applicable to granting of leave —Industrial Relations Act 1967, s 33(3)

In this case the appellants had applied to the High Court for leave to apply for an order of certiorari to quash an award of the Industrial Court and for leave to apply for an order of mandamus against the Industrial Court. The applications were dismissed in the High Court. The appellants appealed.

Held, allowing the appeal:

(1) Leave to appeal for an order of certiorari ought to have been given in this case. The learned Judicial Commissioner in his grounds of judgment had gone further than the leave stage and embarked on substantial issues on merits. This was not the right approach when the application for leave to apply for an order of certiorari is made.

(2) The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case the appellants had prima facie an arguable case for the grant of the relief they sought.

[Didalam kes ini perayu-perayu telah membuat permohonan kepada Mahkamah Tinggi untuk mendapat kebenaran untuk memohon perintah certiorari supaya membatalkan award Mahkamah Perusahaan dan kebenaran untuk memohon perintah mandamus terhadap Mahkamah Perusahaan. Permohonan-permohonan itu telah ditolak di Mahkamah Tinggi. Perayu-perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan:

(1) Kebenaran untuk memohon perintah certiorari sepatutnya diberi didalam kes ini. Yang ariff Pesuruhjaya Kehakiman didalam alasan penghakimannya telah melebihi peringkat mendapat kebenaran dan telah memutuskan issu-issu pokok kes itu keseluruhannya. Cara pendekatan itu adalah tidak betul apabila permohonan untuk mendapat kebenaran itu dibuat.

(2) Prinsip-prinsip yang seharusnya menjadi panduan ialah pemohon hendaklah menunjukkan secara prima facie bahawa permohonan itu bukan remeh dan menyusahkan dan ada terdapat bahan didalam alasan-alasan menyokong permohonan itu. Diatas keterangan yang diberi didalam kes ini perayu-perayu mempunyai kes prima facie yang boleh dihujjahkan untuk mendapat relif yang mereka memohon. Permohonan mereka tidaklah remeh atau menyusahkan.]

Legislation referred to
Industrial Relations Act 1967 s 33(1)

Appeal from: Originating Motion No R8-32-135-89 (High Court, Kuala Lumpur)

B Lobo for the appellants.
R Rajasingam for the respondents.

Cur Adv Vult

Ajaib Singh SCJ (delivering the judgment of the court): This was an appeal by the appellants against the decision of the High Court dated 7 December 1988 whereby the appellants' application for leave to apply for an order of certiorari to quash the Industrial Court Award No 234 of 1980 dated 9 September 1988 was dismissed. Also dismissed by the High Court in the same application was for leave to apply for an order of mandamus that the Industrial Court hears and determines according to law the appellants' application for interpretation under s 33(1) of the Industrial Relations Act 1967.

By way of ex parte notice of motion dated 7 October 1988 the appellants applied to the High Court seeking the following relief:

(1) leave be granted to the applicants to apply for an order of certiorari to bring up and quash Industrial Court Award No 234 of 1988 dated 9 September 1988;
(2) leave be granted to the applicants for an order of mandamus directed to the Industrial Court to hear and determine according to law the applicants' application for interpretation dated 23 May 1988 under s 33(1) of the Industrial Relations Act 1967 by a different division of the Industrial Court from that which made the said Award No 234 of 1988.

Section 33(1) of the Industrial Relations Act 1967 reads as follows:

> If any question arises as to the interpretation of any award or collective agreement taken cognizance of by the Court, the Minister may refer the question, or any party bound by the award or agreement may apply, to the Court for a decision on the question.

The grounds upon which the relief was sought were set out in the appellant's statement pursuant to O 53 of the Rules of the High Court 1980 as follows:

> In making the said Award No 234/88 the Industrial Court did not take into account matters it ought to have taken into account, instead took into account matters it should not have taken into account and thereby exceeded and or acted without jurisdiction in particular:
>
> (i) misconstruing s 33 of the said Act and not taking into account the provisions of s 52(2) of the said Act;
> (ii) misconstruing the provisions of s 33(5) of the said Act;
> (iii) not according the applicants the right to be heard on the merits or demerits of their application in compliance with the principles of natural justice as enshrined in s 33(2) of the said Act before dismissing the said application.

In an affidavit filed by Hiew Sit Sang the general secretary of the appellants states, inter alia, as follows:

> Pursuant to s 33(1) of the Industrial Relations Act 1967 (hereinafter referred to as 'the said Act') the applicants filed an application in the relevant statutory form for interpretation of art 34 of the Industrial Court Award No 54/81 and art 31 of the 1984 Collective Agreement in both of which award and collective agreement the applicants and the respondents were parties.
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> Subsequently the respondents filed a statement in reply as directed by the Industrial Court.
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> The matter was fixed for hearing on 7 September 1986 by the Industrial Court constituted by the learned President and a panel of three members. I was present in court on 7 September 1988 with the applicants' counsel.
>
> At the commencement of proceedings on 7 September 1988 the applicants' counsel pointed out to the court about the provisions of s 33(5) of the said Act as to constitution of the court as a preliminary requirement to be complied with before the court proceeded to hear the merits or demerits of the applicants' substantive application.
>
> The Industrial Court took note of this preliminary issue and then after a brief submission by counsel adjourned for about 30 minutes and ruled that the applicants' application is 'struck-off'.
>
> I verily believe that when the applicants' counsel asked for confirmation that the matter was being 'struck-off', the learned President of the court confirmed it and stated that the court's written grounds for the ruling will be given in due course.
>
> On 15 September 1988, the applicants' solicitors received the said written grounds of the court as Award No 234 of 1988 and dated 9 September 1988 dismissing the applicants' application.
>
> I am advised in law and verily believe that in making the said award the Industrial Court did not take into account matters it ought to have taken into account, instead took into account matters it should not have taken into account and thereby exceeded its jurisdiction and or acted without jurisdiction in particular:
>
> (a) misconstruing s 33 of the said Act and not taking into account the provisions of s 52(2) of the said Act;
> (b) misconstruing the provisions of s 33(5) of the said Act;
> (c) not according the applicants the right to be heard on the merits or demerits of the application in compliance with the principles of natural justice as enshrined in s 33(3) of the said Act before dismissing the said application.

Section 33(3) of the Industrial Relations Act 1967 reads as follows:

> The parties bound by the award or agreement shall be afforded a reasonable opportunity of being heard.

At the outset of the hearing of the appeal before us we indicated to the parties that we would hear submissions on the issue of leave only. After giving due consideration to the evidence in this case and the submissions advanced by the parties we were of the view that leave to apply for an order of certiorari ought to have been given. In his grounds of judgment the learned Judicial Commissioner had gone further than the leave stage and embarked on substantial issues on merit. We did not think that this was the right approach when the application for leave to apply for an order of certiorari is made. The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case we found that the appellants had prima facie an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious. There were grounds to consider the allegations made by the appellants and which could only be properly heard and determined on the substantive application for an order of certiorari after leave has been granted.

For these reasons we were of the view that the appeal should be allowed and the appellants be given leave to apply for an order of certiorari to quash the Industrial Court Award No 234 of 1988 dated 9 September 1988.

Appeal allowed.

Solicitors: *Lobo & Associates; RR Singham.*

Reported by *Prof Ahmad Ibrahim*

Public Prosecutor v Choo Ching Hwa & Anor

SUPREME COURT (KUALA LUMPUR) —CRIMINAL APPLICATION NO 07-11-90
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND JEMURI SERJAN SCJJ
3 AUGUST 1990

Criminal Procedure —Question of law of public interest —Criminal breach of trust —Accused acquitted in session court —Appeal to High Court dismissed —Reference to Supreme Court —Application by public prosecutor for leave —Proof of dishonesty —Whether question of law of public interest arose during appeal and whether determination of the question affected the event of appeal —No evidence other than assertion of deputy public prosecutor —Courts of Judicature Act 1964, s 66(1)

The respondents in this case had been tried in the sessions court at Kuala Lumpur for criminal breach of trust under s 409 of the Penal Code. The respondents were acquitted without their defence being called. An appeal to the High Court was dismissed. The public prosecutor then applied for leave under s 66(1) of the Courts of Judicature Act 1964 to refer several questions of law to the Supreme Court. The questions all related to what in law amounts to dishonesty and whether in the context of the case dishonesty had been proved. No evidence was given, other than the assertion of the deputy public prosecutor, whether the questions were in fact that on which the learned judge decided the appeal. Neither the grounds of judgment of the